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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

RALPH RAYNOR,
Respondent.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

CHETT FOWLER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

No opinion was rendered by the District Court. The charge to the jury is set forth at record 72-80. The opinion of the Circuit Court of Appeals is reported in 89 F. (2d) 469 and is also set forth twice in the record, pages 105-111 and pages, 117-122.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered on March 23, 1937. (R. 111, 123.) Petitions for rehearing were denied on May 11, 1937. (R. 112, 123.) Petitions for writ of certiorari was filed June 15, 1937, and granted October 11, 1937. The jurisdiction of the Supreme Court was invoked under Section 240a of the Judicial Code as amended. (28 U. S. C. A. 347.)

QUESTION PRESENTED.

Whether the provisions of that portion of Section 150 of the Criminal Code (18 U. S. C. A. 264) under which respondents were convicted, refer to paper which is neither the genuine distinctive paper adopted by the Secretary of the Treasury nor paper adapted to the making of genuine government obligations and securities.

STATEMENT.

We respectfully ask leave to supplement the statement in the government brief with the following.

Section 147 of the Criminal Code (18 U. S. C. A. 261) defining obligations of the United States is copied in Appendix hereto, page 25.

The order of the Secretary of the Treasury dated February 1, 1928, adopting Distinctive Paper for United States Currency and Other Securities, is copied in Appendix hereto, page 25. (This order was not introduced in evidence at the trial, but is, we understand, the order involved in the case. (R. 52.)

The respondents, Raynor and Fowler, were not counterfeiters and it was expressly understood and agreed between them that no counterfeiting would be done. (R. 13, 14, 18, 19.) The negotiations culminating in the scheme proved against respondents, were initiated by a government informer, Cones, who had himself been convicted of counterfeiting in 1931 and after serving part of his sentence was paroled and became an informer for the government, receiving compensation for each case. (R. 18.) In 1935 Cones tried unsuccessfully to implicate Fowler in illegal narcotic transactions. (R. 17, 18.) Finally Cones testified that he and Fowler agreed on a plan in substance as follows: Cones told Fowler that Cones would procure a victim with a large amount of ready cash such as $10,000 who would be desirous of purchasing counterfeit money at one-half face value, and Fowler agreed to produce a man who would pretend to but would not actually counterfeit money, and the victim would be swindled of his money by securing possession of his $10,000 and running off with it. (R. 14.)

The indictment, as noted by the Circuit Court of Appeals, does not set forth a charge consistent with the present theory of the government. The majority opinion said:

> "The defendants were not charged with possessing paper adapted to the making of counterfeit currency that might reasonably be expected to pass in the trade of the country, but were charged with possessing paper adapted to making genuine obligations of the United States." 89 F. (2d) 472. (R. 108.)

In addition to the evidence as to similarity of Government Exhibits 3 and 28 mentioned in the government's statements, there was testimony of dissimilarity, namely, that Government Exhibit 3 was not as heavy a quality as Government Exhibit 28 (R. 64); that the two papers were

not similar as far as the formation of the paper was concerned (R. 68); that the two papers are not of the same shade of white and that the government paper is harder and has more sizing or glue on it (R. 70); that the government paper formation is a little "wilder" than that of Government Exhibit 3. (R. 71.).

Government counsel stated "Chemically, we don't contend that it is the same" (R. 50), evidently meaning that the constituent elements of the pulp from which the two papers were made, were different in quality or quantity or both.

Defense witness, Hargitt, mentioned in the government's statement, testified, "I am sure that I could pick the two papers out any place, but that probably is not what the average man could do." (R. 70.)

Government witnesses, Gallagher, a secret service agent, and Burton, a chemist and paper analyst of the Treasury Department, testified that the Treasury Department did not use any paper like Government Exhibit 3 for printing government obligations (R. 49, 51, 56), because the paper did not have silk threads in it. (R. 49, 51.)

Government witness, Burton, testified that: "most any bond paper could be used for the printing of securities" (R. 53), meaning, evidently, counterfeit securities as he and Gallagher testified that no paper other than the distinctive government paper could be used for the printing of genuine government obligations. (R. 49, 51, 56.) He also testified that the government paper would be suitable for ordinary use as typewriter paper. (R. 57.) Mr. Burton also testified that the government paper is not on the market but that a paper similar to it is (R. 57), meaning, evidently, a white bond paper but without silk threads and fibers woven therein. If government obligations were printed on Exhibit 3 there would be "just

as good an impression and just as good a printing quality" (R. 58), as if printed on the distinctive genuine government paper.

Therefore the majority of opinion of the Circuit Court of Appeals stated:

> "the Secretary of the Treasury would scarcely be called upon to grant authority to one to possess paper adapted only to the making of spurious obligations. Otherwise every manufacturer, merchant, or printer, making, dealing in, or using the higher grade bond paper similar to that adopted by the government would be required under the terms of this act to gain the permission of the Secretary of the Treasury to lawfully possess such paper. No such situation was, of course, contemplated by Congress unless such paper is at the same time adapted to the making of such genuine obligations. Under the evidence before us much of the better grades of bond paper is so adapted except for the absence of the red and blue silk fibers." (89 F. (2d) 472.) (R. 108.)

ARGUMENT.

The Statutory Provisions Involved Do Not Cover Paper Which Does Not Have Red and Blue Silk Fibers Woven into the Body of the Paper Because Without Such Fibers Woven Therein Paper Is Not Adapted for Making Genuine Obligations and Securities of the United States.

We respectfully submit that the language of the statute is plain and needs little, if any, construction to demonstrate that the paper here involved, Government Exhibit 3, is not covered by its terms. The statute seems unmistakably to refer only to paper adapted for making genuine government obligations and securities. This charge was laid under Section 150 of the Criminal Code of the United States (18 U. S. C. A. 264), which, so far as material, reads as follows:

> "* * * or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined," etc.

It is conceded that the paper here involved, Government Exhibit 3, is not adapted for making genuine obligations and securities. The Circuit Court of Appeals said:

> "The words 'such obligations or other securities' are also involved. We think such words refer back to the genuine obligations and securities of the United States. These are the plain words of both the statute and the indictment. * * * We think the argument

> of the District Attorney is directly in the face of the plain words of the statute." 89 F. (2d) 472. (R. 108.)

In the case of *Krakowski* v. *United States,* 161 F. 88, 89, the Circuit Court of Appeals of the Second Circuit said:

> "The words 'adapted to the making of such obligations' clearly refer to the obligations of the United States just before mentioned in the statute. There is no room for reading anything else into the statute and no basis for doing so."

Moreover, the requirement of authority from the Secretary of the Treasury, clearly points to paper adapted to making genuine obligations. As the majority of the Circuit Court of Appeals said (p. 472):

> "The Secretary of the Treasury would scarcely be called upon to grant authority to one to possess paper adapted only to the making of spurious obligations."

In the Krakowski case (161 Fed. 88), it was said that this clause "necessarily implies that some persons may be authorized to have it (the paper) in their possession. And, while the Secretary might properly authorize certain manufacturers to have in their possession the government paper or paper similar and adapted to making government obligations, an official authorization of the possession of paper suitable for counterfeiting would be unique in character."

A similar interpretation of a like clause was given in the case of *U. S.* v. *Addatte,* Fed. Case No. 14423 (6 Blatchf. 132), Circuit Court, Eastern District of New York, March 2, 1868, by District Judge Benedict, on motion in arrest of judgment of conviction under the Act of June 30, 1864 (13 Stat. 222). Judge Benedict held that Section 12 of that Act did not cover the case of possession

of counterfeit plates of the currency but applied only to genuine transferred plates made after the similitude of other plates. Judge Benedict, speaking of the clause requiring official authority to justify possession, said (p. 764):

> "This qualification of possession, which is by the Act made an offense, indicates an intent to restrict the effect of the Act to the case of unauthorized possession of such plates as may be within the authority of the Secretary of the Treasury, or the Comptroller of the Currency. Therefore, it does not cover a case of the possession of false or counterfeit plates, which cannot, under the law, be authorized by the Secretary of the Treasury, and which his warrant cannot protect."

In *Pirie* v. *Chgo. T. & T. Co.*, 182 U. S. 438, 451, 21 S. C. 906, 912, the Supreme Court, speaking of the rule that the intent of a statute is to be looked for in its words, said:

> "Where they are clear and involve no absurdity, they are its only expositors."

It follows, therefore, we respectfully submit, that the paper here involved, Government Exhibit 3, is clearly excluded from the operation of the statute because it does not contain red and blue silk fibers and is, therefore, not adapted for the making of the genuine obligations and securities of the United States.

However, if the contention of the government that the statute requires construction be granted, the true rule for such construction is set forth in a recent decision of this court in the case of *United States* v. *Resnick*, 299 U. S. 207; 57 S. C. 126, in which the court said at page 209:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held

to extend to cases not covered by the words used. *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37; *Fasulo* v. *United States*, 272 U. S. 620, 628, 47 S. C. 200, 201, 71 L. Ed. 443. * * * Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses. *United States* v. *Lacher*, 134 U. S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080; *United States* v. *Chase*, 135 U. S. 255, 261, 10 S. Ct. 756, 34 L. Ed. 117; *Fasulo* v. *United States*, *supra*, 272 U. S. 620, at page 629, 47 S. Ct. 200, 202, 71 L. Ed. 443."

The court also said, at page 210:

"As in the absence of governmental regulation the making and selling of containers is untrammeled, failure expressly to permit is not to prohibit."

So here ordinarily possession of paper not adapted for printing government obligations and securities is untrammeled, and failure expressly to permit is not to prohibit.

In *Prussian* v. *U. S.*, 282 U. S. 675, 51 S. C. 223, holding that forgery of an indorsement upon an obligation did not constitute forgery of the obligation under Sec, 148, Criminal Code (18 U. S. C. A. 262), the court said at p. 677:

"It is apparent that a draft drawn on the Treasurer by an authorized officer is an 'obligation * * * of the United States' both in common parlance and by the express definition of Section 147. But to extend the meaning of that phrase so as to embrace the indorsement on the government draft is to enlarge the statutory definition, and would be possible only by a strained construction of the language of Sections 147 and 148, inadmissible in the interpretation of criminal statutes, which must be strictly construed. See *Fasulo* v. *U. S.*, 272 U. S. 620, 47 S. C. 200, 71 L. Ed. 443; *United States* v. *Salen*, 235 U. S. 237, 35 S. C. 51, 59 L. Ed. 210."

Reference in the government brief to statutes prohibit-

ing possession of opium is not helpful to its contention. Opium is an "illegitimate commodity," *Yee Hem* v. *United States,* 268 U. S. 178, 184, 45 S. C. 470, 471. Legitimate possession of opium, except for medicinal use, is highly improbable. Not so in the case of white bond paper which is a legitimate commodity, used extensively for legitimate purposes and only infrequently and on extraordinary occasions used for criminal purposes such as counterfeiting. Therefore interdiction of its possession because possibly it could be used for illegitimate purposes should, we respectfully submit, not be read into the statute in the absence of plain language expressing such intent.

Moreover as pointed out by the majority opinion of the Circuit Court of Appeals, the construction of the statute desired by the government would place an unreasonable burden upon thousands of manufacturers and dealers in white bond paper by requiring them to obtain authority from the Secretary of the Treasury to have possession of such paper (89 F. (2d) 472). (R. 108.)

The setting forth in the appendix to the government brief of numerous statutes against counterfeiting (most of which have been repealed) fails to give support to the government's contention here. It is not disputed that Congress wishes so far as practicable to prevent counterfeiting. However, the legislature doubtless also had in mind the preservation of the rights of the citizen and merchant and the hardship and embarrassment that would be caused to the innocent public by sweeping prohibition of the possession of legitimate and useful articles.

The construction advanced here by the government would seem to "spread a net that might catch the unwary, as well as the fraudulent." *U. S.* v. *Salen,* 235 U. S. 237, 250, 35 S. C. 51, 54. It would "fix no

standard'' by which to draw the line between innocence and guilt.

The government brief, anticipating this objection of lack of such standard in its construction of the law, says (p. 29) that any paper is prohibited which the jury finds ''so resembles the distinctive paper as to lead the ordinary individual to believe that a counterfeit made upon it is a genuine obligation of the United States.'' This is incorrect and is moreover not the issue submitted to the jury here, which issue was also incorrectly formulated.

There was no counterfeit upon the paper here. Consequently the jury could not have applied the above-mentioned standard and were not instructed to do so. The court charged (R. 77):

> ''The statute does not say that this paper, in order to be similar, necessarily has to contain threads in it. It might be similar and have markings on it that would lead one to believe that it is the genuine paper as adopted by the Secretary of the Treasury.
> 'Adapted' as defined means suitable, corresponding. This definition of the term 'adapted' does not mean that it is paper which the Government will have in its possession for making money, but the question is whether or not it is similar paper and is adapted to the making of money to pass in circulation.''

In *Iselin* v. *U. S.*, 270 U. S. 245, 46 S. C. 248, the government contended for a sweeping construction of a law imposing a tax on sales of theatre tickets. It argued (270 U. S. p. 250) that Congress intended to tax all sales of tickets and that this general purpose of Congress should be given effect, so as to reach any case within the aim of the legislation. This the Supreme Court declined to do, holding that: ''To supply omissions transcends the judicial function.'' (270 U. S. p. 251.)

Similar in principle is *U. S.* v. *Resnick*, 299 U. S. 207, 57 S. C. 126, where the law prescribed standard hampers

for fruit and vegetables in nine sizes and the government sought to have the statute construed to cover an additional size not specified in the statute. This the court refused to do.

In *Pirie* v. *Chgo. T. & T. Co.,* 182 U. S. 438, 451, 21 S. C. 906, 911, speaking of a construction of a statute, the court said:

> "It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation the contradiction of the reason which grows out of the subject matter of the legislation and the purpose of the legislators. But all legislation is not simple, nor its consequences obvious, or to be controlled, even if obvious. Whether there should be any legislation at all, and its extent and form, may be matters of dispute. Its consequences may be viewed with favor or with alarm; some regretted, but accepted as inevitable,—accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed, and considered as overbalanced by the particular advantages the act was calculated to produce."

And at p. 452 U. S. (p. 912 S. C.) continued:

> "* * * But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

Again as noted by the majority opinion of the Circuit Court of Appeals (89 F. (2) 472) the contention of the

government would make the provisions of the statute far more drastic with respect to white bond paper than with respect to other articles constituting much more advanced steps in counterfeiting. Thus in the fifth clause of the statute there is forbidden the possession of a spurious obligation with the intent to sell or use same. A spurious obligation is, of course, in its nature essentially illegitimate and adapted primarily for unlawful purpose such as selling or using as currency. White bond paper is in its nature essentially legitimate and adapted primarily for lawful business and mercantile purposes. Nevertheless if the contention of the government were sound, this fifth clause would be more difficult of proof than the seventh clause relating to paper because the mere possession of paper constitutes an offense while the possession of a spurious obligation is not criminal unless accompanied by a specific intent to sell or use. In short, the government's contention logically means that the possession of white bond paper without more is criminal while the possession of a counterfeit obligation without more is not criminal. The possession of a legitimate article, namely, white bond paper which might possibly in rare instances be put to an unlawful use of producing an illegitimate object, a counterfeit obligation or security, would be punished, while the possession of the unlawful article itself would not be punished. Similar inconsistencies in meaning could be pointed out between the seventh clause and other clauses of the statute if the government construction were adopted.

Some of the contentions of the government are based upon language in former statutes which have been repealed and have not been reenacted, or when reenacted, lacked the language on which the government relies. Thus Section 7 of the Act of February 25, 1862, c. 33,

12 Stats. 345, prohibited the custody or possession of the described paper, "with intent to use such paper or suffer the same to be used, in forging or counterfeiting any of the notes, bonds, coupons or other securities", etc. The reason for prohibiting the possession without authority of such paper unquestionably was and is to prevent the possibility of its use in counterfeiting (printing illegally or without official authority) the obligations and securities of the United States. Feeling, no doubt, that the possession of the genuine government paper or a duplicate thereof with silk threads woven therein was so extraordinary and uncalled for on the part of a private individual or firm that the possessor should be required to explain such possession as legitimate, without requiring proof by the prosecution of specific criminal intent, Congress repealed the requirement of proof of specific intent.

In *U. S.* v. *Addatte, supra*, Fed. Case No. 14423 (6 Blatchf. 132), Judge Benedict said of Section 12 of the Act of June 30, 1864 (13 Stat. 222):

> "In the section under consideration, an intent to use the plate is not made a part of the offense, and for the reason that, as the section is applicable only to genuine plates, which are intended to be kept within the control of the government, the unauthorized possession is to be considered as itself an unlawful act, without regard to any intention to use the plates."

This change in the law strengthens respondents' position with respect to the meaning of the law. It cannot be doubted that if Congress wished to strike at the possession of white bond paper which is only incidentally suitable for counterfeiting (R. 53, 58), but primarily for many legitimate uses, the legislature would have retained the requirements of specific evil intent or of a definite overt act just as it had done in the instance of other articles much further advanced toward the completion of the act

of counterfeiting, such as the possession of a plate with intent to use in counterfeiting, the possession of a spurious obligation with intent to sell or use, etc., or the making or selling of a plate, print, photograph, etc., without official authority. (See majority opinion of the Circuit Court of Appeals, 89 F. (2d) 472.)

Very significant in this connection is the fact that when Congress wished to punish imitating and counterfeiting the government paper it said so in plain language in Section 8, Act of March 3, 1863, c. 73, 12 Stat. 709 (see p. 50, Appendix to Government Brief). Also significant is the fact that this section has been repealed and is not law at the present time.

The quotations in the government brief from the English statute confirm the accuracy of the statement in the Krakowski case (161 Fed. 88) that the clause here involved was modeled upon the English section relating to genuine government paper (24 and 25 Vict., c. 98, Sec. 11).

An entirely different section of the English law (Sec. 10) covers making paper having in its "Substance" * * * "any Words, Letters, Figures, Marks, Lines, Threads, or other Devices peculiar to and appearing in the Substance of any Paper provided or used for such Exchequer Bills, Bonds, or Debentures," etc., and "intended to imitate the same." This section also provides punishment for possessing *"any Paper whatsoever"* in the Substance whereof shall appear any such words, etc., and intended to imitate.

The clause in our law here involved clearly bears no analogy to the last mentioned section (Sec. 10) but does closely resemble the terms of Sec. 11 of the British law relating to genuine government paper.

The contention of the government that since it is claimed counterfeits are seldom made upon genuine government paper, the statute should be given a broad construction in order to cover all papers incidentally suitable for counterfeiting, seems without force. The fact that the law is effective in protecting the government paper does not seem to be reason for enlarging the meaning of the statute to cover paper having no relationship to the government paper. Moreover the argument ignores the effect of the law on similar paper "adapted" (having silk threads in the body) for making genuine obligations.

We suggest that the construction proposed by the government would inure rather to the protection of individuals than of the currency of the United States. Respondents are deserving of severest censure and possibly are amenable to state laws. However, the plan in which they were involved did not contemplate counterfeiting but instead a swindle upon a person represented by the informer Cones to be desirous of buying counterfeit money at a price of one-half face value. There was no evidence by the Government that counterfeit money is usually (or ever) printed on paper having pencil marks on the surface like Govt. Ex. 3.

In *Prussian* v. *U. S.*, 282 U. S. 675, 51 S. C. 223, this court held that forging an indorsement of the payee's name on a government draft was not forgery of an obligation of the United States under Sec. 148 of the Criminal Code (18 U. S. C. A. 262). The court said at p. 678:

> "Its (Sec. 148) purpose has been declared by this court to be the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals."

A significant clause is found in another statute set forth in the appendix to the government brief. In Section 12

of the Act of June 30, 1864, c. 172, 13 Stats. 218, it was made a crime to print any bronzed or gilt letters or to print any letters, figures or devices with green ink upon any note, bond, etc., provided that the provisions should not be construed to prohibit or restrain the lawful use by any person of any ink, color or pigment, the exclusive right to which had been secured by letters patent. Commercial white bond paper certainly is no more dangerous as a possible instrumentality in counterfeiting than is green ink. The law carefully limited the application of the statute to the use of green ink. Notwithstanding such limitation, however, the statute was repealed and at the present time (so far as we can ascertain) there is no prohibition of the possession of green ink, notwithstandig its possible use as a means of counterfeiting.

The majority opinion of the Circuit Court of Appeals (89 F. (2) 472) held that the words of the statute "such obligation or other security" refer to the genuine obligations and securities of the United States. So also did the Krakowski decision, 161 Fed. 88. Government counsel have been unable to suggest any other reasonable meaning to these words. The dissenting opinion of Judge Lindley contends that the statutory construction adopted is "strained and over-literal." This, we respectfully suggest, is an admission that the majority properly construed the letter of the law. We also submit that its construction of the law is in accord with its spirit and intent and that the broad and sweeping interpretation of the statute advanced by Judge Lindley and government counsel would, if adopted, constitute virtually legislative enactment by the courts. The construction advanced by Judge Lindley and government counsel seems consistent only with an assumption that Congress did not say what it intended to say. We submit this is not so, but if it were so, it is not the province of the courts to supply omissions of the stat-

ute. In *Pirie* v. *Chgo. T. & T. Co.*, 182 U. S. 438, 452, 21 S. C. 906, 912, the Supreme Court said:

> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

In *Iselin* v. *U. S.*, 270 U. S. 245, 250, 46 S. C. 248, 250, this Court said:

> "The statute is evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted presumably by inadventence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States* v. *Weitzel*, 246 U. S. 533, 543; *Peoria* v. *Pekin Union Ry. Co.*, 263 U. S. 528, 534, 535."

Moreover, if the statute had been intended by Congress to have the broad and sweeping interpretation disapproved in the Krakowski decision, 161 Fed. 88, surely it would have been amended to overcome the effect of that decision, in the twenty-eight year period since its rendition.

II.

The Holding in the Krakowski Case That the Statute Applies Only to Paper Adapted for Making Genuine Obligations and Securities, Has Been Acquiesced In By Congress and the Department of Justice For Twenty-eight Years.

The Krakowski decision (161 Fed. 88) was rendered in 1908. It has stood since that time to the present, not only without disapproval, but also without adverse comment thereon by any Federal court. Moreover, there is no

reported decision indicating that the Department of Justice took issue with that decision until the present case. It appears evident, therefore, that the Krakowski case has been accepted as embodying the correct interpretation of the statute for a period of some twenty-eight years, both by the Treasury Department and the Department of Justice of the United States. Had the officials of either of these departments felt that the Krakowski decision were incorrect it cannot be doubted that other prosecutions based upon the construction of the statute which was disapproved in that case, and which is the basis of the conviction in the present case, would have been instituted and have resulted in decisions by the Court of Appeals, and probably the Supreme Court of the United States, in the twenty-eight year period mentioned.

Indeed, in 1868, forty years before the Krakowski decision, Judge Benedict in *U. S.* v. *Addatte, supra,* Fed. Case No. 14423 (6 Blatchf. 132) attributed to the clause without authority from the Secretary of the Treasury, substantially the same purpose and meaning later attributed to it in the Krakowski case.

The indictment here (R. 3) gives evidence of this Departmental acquiescence, as the charge is that the paper was adapted to the making of "such" meaning genuine obligations of the United States, as held by the Courts of Appeals in both the Krakowski (161 F. 88, 89) and Raynor (89 F. (2d) 469, 472). cases.

In the case of *United States* v. *Cerecedo Hermanos Y Compania,* 209 U. S. 337, 339, 28 S. C. 532, the Supreme Court said:

> "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson* v. *Downing,* 127 U. S. 607, 8 S. C. 1328; *U. S.* v. *Healey,* 160 U. S. 136, 16 S. C. 247.

In addition, apparently Congress has approved and acquiesced in the construction set forth in the Krakowski decision. In 1908 this statute was known as Section 5430 of the Revised Statutes. About eighteen months thereafter the statute was re-enacted without change as Section 150 of the Federal Penal Code, in force January 1, 1910. Again, this section was re-enacted, without change, (Section 264 U. S. C. A.) in the Code of Laws of the United States, in force December 7, 1925, as enacted by Congress June 28 and approved June 30, 1926. Certainly, if Congress had felt that the construction of the statute in the Krakowski case (161 Fed. 88), were erroneous, the legislature would have amended the statute either in the codification of 1910 or that of 1925, or at some other time within the twenty-eight year period.

The rule, of course, is that when a statute has been re-enacted it incorporates settled existing interpretations.

In *Heald* v. *District of Columbia,* 254 U. S. 20, 41 S. C. 42, the Supreme Court, at page 23, said that it was

> "a settled rule that, where provisions of a statute had previously to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary."

To the same effect is *Bruce* v. *Tobin,* 245 U. S. 18, 38 S. C. 7.

In *U. S.* v. *Cerecedo Hermanos Y Companio,* 209 U. S. 337, 339, 28 S. C. 532, it was said:

> "And we have decided that the re-enactment by Congress without change of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction. *U. S.* v. *G. Folk & Bro.,* 204 U. S. 143, 152, 27 S. C. 191."

In *Latimer* v. *U. S.,* 223 U. S. 501, 504, 32 S. C. 242,

speaking of the meaning of the words "unmanufactured tobacco" it was said:

> "The words having received such a construction under the Act of 1883 must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute Congress adopted the construction already given it by this Court."

In *Beale* v. *U. S.*, 71 Fed. (2d) 737 (8th C.) the Court, speaking of the fact that no amendments of a statute had been made in a three-year period since a decision of the United States Supreme Court construed the statute, said, at page 739:

> "We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have Congressional sanction and approval."

In view of the fact that the law has twice been construed by two Circuit Courts of Appeals contrary to the contention of the government and that the first of these decisions has stood for a period of some twenty-eight years without adverse comment or criticism by any other court, it seems apparent, we respectfully submit, that the government here seeks to have the Supreme Court do what Congress has declined to do, namely, to make unlawful the possession of any paper which might conceivably be used in the making of counterfeit obligations. The Supreme Court has often declined to assume the functions of a legislative body. *Iselin* v. *U. S.*, 270 U. S. 245; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643.

III.

Regardless of the Construction of the Statute, the Judgments of the Circuit Court of Appeals Should Be Sustained Because There Was No Evidence In Support of the Offense Charged in the Indictment.

Even were the construction advanced here by the government correct, the judgments of the Circuit Court of Appeals in the instant case should be sustained. The Court of Appeals said (89 F. (2d) 472):

> "The defendants were not charged with possessing paper adapted to the making of counterfeit currency that might reasonably be expected to pass in the trade of the country, but were charged with possessing paper adapted to making genuine obligations of the United States."

In the Krakowski case, 161 F. 88, a similar indictment was similarly construed, the court saying:

> "He (defendant) was indicted for having in his possession paper adapted to the making of the obligations 'aforesaid', which were the obligations of the United States. He was not indicted for having paper adapted to the making of unlawful securities. Counterfeit money is not an obligation of the United States."

It is and has been conceded by the Government throughout that Government Exhibit 3 is not adapted for making genuine obligations. Therefore the Court of Appeals concluded (89 F. (2d) 473):

> "We * * * believe that under the undisputed evidence here the defendants were not guilty of the offense defined by the statute and charged in the second count of the indictment."

It therefore follows that as the charge in the indictment was not sustained by the evidence, the conviction should be reversed as directed by the Circuit Court of Appeals.

CONCLUSION.

In conclusion, we respectfully submit that the decision of the Circuit Court of Appeals was correct and its judgments should be affirmed.

Respectfully submitted,

JOHN ELLIOTT BYRNE,
Attorney for Respondents.

GEORGE R. JEFFREY,
W. H. F. MILLAR,
Of Counsel.

APPENDIX.

Section 261, Criminal Code (18 U. S. C. A. 261).

The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress.

Distinctive Paper for United States Currency and Other Securities

1928

Department Circular No. 394

Public Debt

Treasury Department,
Office of the Secretary,
Washington, February 1, 1928.

1. Notice is hereby given that the Secretary of the Treasury, by authority of law, has adopted a new distinctive paper for use in printing United States currency and other securities.

2. The new distinctive paper is a cream-white bank-note paper which closely resembles in general appearance the paper now in use. The distinctive feature of the new paper consists of small segments of red and blue silk fiber

incorporated in the body of the paper while in process of manufacture and evenly distributed throughout.

3. The new distinctive paper shall be used for printing currency of the reduced size, including United States notes, gold certificates, silver certificates, Federal reserve notes, and national bank notes. The use of the present distinctive paper adopted on July 30, 1891, the distinctive feature of which consists of localized red and blue silk fiber incorporated in the body of the paper while in the process of manufacture so placed as to form perpendicular stripes, will be continued for any printing of currency of the present size hereafter required.

4. After the issue of the reduced size currency, the new distinctive paper shall thereafter be used for the printing of interest-bearing securities of the United States, and for any other printing where the use of distinctive paper is indicated; provided, however, that any then existing stocks of blank paper containing the present distinctive feature may be utilized.

5. The Secretary of the Treasury hereby gives notice that the new distinctive paper, together with any other distinctive paper heretofore adopted for the printing of paper currency or other obligations or securities of the United States is and will be subject to the provisions of section 150 of the United States Criminal Code, approved March 4, 1909 (sec. 5430 of the Revised Statutes; sec. 264 of title 18 of the United States Code), which provides, in part, as follows:

Whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Trea-

sury or some other proper officer of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than fifteen years, or both.

6. The provisions of Department Circular No. 121, dated July 30, 1891, are modified accordingly.

A. W. MELLON,
Secretary of the Treasury.